Nos. 84-518
84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, et al.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITIONERS

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I. INTRODUCTION

A. Statement of Interest of Amicus Curiae

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the workforce.

In keeping with its purposes, AARP has devoted itself to investigating and working to alleviate problems resulting from age discrimination, in employment as well as other aspects of life.[1] Many Americans are victims of discriminatory treatment because of age. Such discrimination has been most prominent in the workplace.[2] Not only is this phenomenon unfair to the individual worker, but it robs the nation of valuable human resources. It is for these reasons that AARP sought the consent of the parties to the submission of this brief *amicus curiae*. *See* Exhibits 1, 2 and 3.

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[1] AARP has recently launched a major campaign to improve the employment opportunities available to older workers. The "Older Worker Advocacy Initiative" has as its five goals to: (a) assess the impact of an aging work force on society; (b) eliminate age discrimination in the work force thrugh legislative, administrative and judicial action; (c) eliminate stereotypes of older workers; (d) assist employers in creating workplace opportunities for older workers; and (e) help older persons make informed employment and retirement decisions.

[2] The number of suits brought under the ADEA has increased dramatically as awareness of the Act has grown. For example, 9,479 age discrimination charges were filed with the EEOC in 1981, a 76 percent increase over the number of charges filed in 1979. In 1983, 18,087 cases were filed with the EEOC.

While aging is a universal process, it is also a uniquely individual phenomenon. The physiological changes accompanying aging affect different individuals in different ways and at varying times in their lives.[3] In recognition of this fact and largely as a result of the efforts of AARP, American society has begun to reevaluate its longheld assumptions about the capabilities of older persons, both in and out of the workforce. Just as it has been recognized that an individual's race or sex provides no basis for judging ability, it is becoming increasingly accepted that an individual's chronological age is not an accurate predictor of his or her ability to perform effectively in the workplace.

In the area of employment, AARP's overriding goal has been the eradication of discrimination based upon adverse stereotypes regarding the competence of older persons. AARP has been in the forefront of efforts to eliminate age discrimination in employment, and has long advocated the elimination of mandatory retirement.[4]

AARP strongly supported the enactment of the Age Discrimination in Employment Act ("ADEA" or the "Act"), 29 U.S.C. § 621-634 (1982), as a means of promoting the employment of older workers and of prohibiting discrimination based upon arbitrary age limits. AARP endorses the basic premise of the Act: that a person's fitness for a job should be based upon the

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[3] *See*, H.L. Sheppard & R.E. Rix, *The Graying of Working America: The Coming Crisis of Retirement-Age Policy* (1977), pp. 51-55 (older individuals may help maintain the health status through physical exercise); K. Goldman, *Decline in Organ Function with Age*, Clinical Geriatrics, 19-48 (I. Rossman Ed. 1981). (Various systems in body age at different rates; onset of measurable decline in one's capacity varies widely among individuals.)

[4] *See, e.g.*, AARP Statement on Amending the Age Discrimination in Employment Act Before the Subcomm. on Employment Opportunities of the House Education and Labor Comm., 98th Cong. 2d Sess. (May 17, 1984); AARP Statement in Support of the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, S.2617, Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong. 2d Sess. (August 18, 1982).

qualifications of that individual, and that competent individuals who choose to continue working should, by law, be permitted to do so.

B. Preliminary Statement

The decision below will seriously erode the protections that Congress intended to confer upon workers covered by the ADEA.

The Fourth Circuit's decision would effectively bar a class of workers – non-federal employees whose jobs can be likened to those of federal employees to whom the ADEA was not extended – from effectively litigating in their particular cases the *bona fides* of a compulsory retirement age claimed by their employer to be an occupational requirement. Such a result should not be sanctioned. Instead, this Court should reaffirm the right of every employee within the ADEA's intended ambit to continue to subject a purported BFOQ to the form of case-specific factual scrutiny that has heretofore been required under the Act. Simply stated, in holding that when Congress included a mandatory retirement at age 55 for federal firefighting personnel in a federal civil service retirement statute, Congress intended that retirement age to constitute a *bona fide* occupational qualification ("BFOQ") for every firefighter throughout the nation, the lower court misread the intent of that statute and the ADEA.

II. ARGUMENT

A. Congress Did Not Intend Non-Federal Firefighters To Be Subject To the Federal Mandatory Retirement Age As A Matter Of Law

As the basis for its decision that a mandatory 55-year retirement age constitutes a BFOQ as a matter of law for Baltimore firefighters, the Court of Appeals relied upon the circumstance that "[t]he same Congress that extended the ADEA to the states and their political subdivisions reinvigorated the requirement mandating retirement as a general matter at fifty-five for federal

... firefighting employees."[5] The court reasoned that Congress would not have adopted a Federal occupational qualification for the civil service retirement statute to which federal firefighters are subject "that is not, or might not be, *bona fide*".[6] In consequence, the court concluded as a matter of law that it was required to apply the federal statute's provisions for age-based compulsory retirement as a "congressional mandate" and "federal standard" to non-federal workers under the ADEA.

In reaching that conclusion, the court neglected to bear in mind another decision by "the same Congress" respecting the ADEA – that when the ADEA was extended generally to the states and their political subdivisions as employers,[7] it was also made applicable to a number of federal instrumentalities, but not to the agencies hiring federal firefighters.[8]

Because the federal age-55 mandatory retirement standard was enacted for federal employees to whom Congress chose not to extend the protections of the ADEA, the Court of Appeals was mistaken when it assumed that Congress necessarily intended such a retirement provision to serve as a BFOQ benchmark for non-federal employees who are covered by the ADEA.[9] As

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[5] *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209, 212 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

[6] *Id.* at 213.

[7] 29 U.S.C. § 630 (h)(2).

[8] *See* 29 U.S.C. § 633 a(a). The majority noted this exception to the scope of the ADEA in passing, 731 F.2d at 211, but its implications were not considered in the majority's opinion.

[9] Indeed, the legislative history indicates that the relatively youthful age selected by Congress for federal employees' retirement was intended to serve as a form of reward for exceptionally hazardous federal service, rather than as a BFOQ determination concerning the inability of an older person to perform his duties effectively. *See Stewart v. Smith*, 673 F.2d 485, 487 n.4 (D.C. Cir. 1982) (Public Law 93-350 was intended to improve incentives for early retirement by increasing the annuity value of the first twenty years of service, thereby making early retirement "more economically

this and other courts have made clear, the assessment of the validity of a BFOQ defense to a charge of age-discrimination is subject to a set of strict legal principles respecting the burden of proof and the elements which must be established in order for the defense to prevail.[10] For many non-federal workers, the Fourth Circuit's ruling would reduce those principles to a chimera. That ruling would create the anomalous situation in which an age-based compulsory retirement rule which was intended by Congress to be exempt from the scrutiny provided by the ADEA would preempt the legal analysis prescribed for workers upon whom Congress has explicitly conferred the full panoply of ADEA protections.[11] Such a result would be contrary to the intent of Congress in extending the ADEA's coverage to the Baltimore firefighters here.

B. The BFOQ Exception Should Continue To Be Scrutinized On a Case-By-Case Basis

It is clear from the legislative history of the ADEA and the decisions of the courts that an employer's claim that a mandatory

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(footnote cont'd.)
practicable."); U.S. Code Cong. & Admin. News (1974), p. 3699 ("The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age fifty.").

[10] *See, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983); *Trans World Airlines v. Thurston*, 104 S.Ct. 613 (1985); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

[11] As the District Court below pointed out in a somewhat different context, a mandatory retirement age could pass muster under an Equal Protection analysis yet fail to qualify as proper under the ADEA. *Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. 1287, 1302 (D. Md. 1981), *cert. denied*, 455 U.S. 944 (1982), *rev'd*, 731 F.2d 209 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985); *cf., Arritt v. Grisell*, 567 F.2d 1267, 1272 (4th Cir. 1977); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 749 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 484 (1983) ("mandatory retirement schemes approved by Congress are not subject to the strict requirements of the ADEA, rather such schemes need only be rationally related to a permissible government objective.").

retirement age constitutes a BFOQ should be subjected to an individualized judicial review – based upon the particular cluster of facts and the most recent medical and other expert opinions relating to the specific job at issue.[12] Here, in what the Court of Appeals termed a "thorough, impeccably reasoned opinion,"[13] the District Court conducted such a fact-specific review and concluded that the compulsory retirement age could not be sustained as a BFOQ. The Court of Appeals' rejection of that factual analysis, and its application of the federal firefighters' retirement provisions as a matter of law, are contrary to the proper rules of proof under the ADEA.

If the approach adopted by the Court of Appeals is sanctioned here, the legislative scheme enacted by Congress to guard against age discrimination in employment will be substantially impaired.

In the first place, a worker who seeks to challenge a purported BFOQ and the Court reviewing such a challenge will no longer have an opportunity to rely upon the most up-to-date expert evidence. In this case, the federal retirement rule applied by the Court of Appeals dates from 1974.[14] Since that time, the corpus of medical knowledge concerning older workers has expanded considerably.[15] As the factual record developed in the District Court revealed, a substantial body of medical and other scientific findings bearing upon the capacity of older firefighters

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[12] *See, e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) 7, *reprinted in* U.S. Equal Employment Opportunity Commission, *Legislative History of The Age Discrimination in Employment Act* 80; *EEOC v. Wyoming*, *supra*; *Orzel v. City of Wauwatosa Fire Dep't*, *supra*.

[13] 731 F.2d at 213.

[14] 731 F.2d at 212.

[15] As the District Court noted below, "Because of technical improvements *in recent years*, physicians *can today* much more readily test for cardiological problems which a fireman or other similar worker might have." 515 F. Supp. at 1298 (emphasis added).

to perform their duties has come into being.[16] Indeed, just last year the Chairman of the Select Committee on Aging of the House of Representatives issued a report marshalling the scientific evidence against a mandatory retirement age for firefighters.[17]

Were the courts to look only to a years-old statute and its contemporaneous legislative history (including any scientific support relied upon by the draftsmen) to validate a BFOQ, recent and therefore compelling evidence that the statute's premises about the impact of age have become medically obsolete would be excluded from judicial consideration. There is no basis for a belief that Congress intended to insulate any employer's practices from such an up-to-date scientific assessment.

The degree to which the Court of Appeals' approach deviates from the proper ADEA standard is highlighted by the second form of analysis that it would exclude. Every circuit that has considered the BFOQ exception has adopted the two-prong test

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[16] *See, e.g.*, 515 F. Supp. at 1298.

[17] *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*, A Report by the Chairman of the Select Committee on Aging, 98th Cong., 2nd Sess., 9-15 (1984) (House Aging Report). The Report states, "Abilities associated with job performance do not invariably decline with age. As workers age, there is greater variation in their abilities, and in some cases there is improvement of certain skills and abilities with the added experience that comes with age. An individual's ability to perform his or her job can be measured. In fact, research on the job performance of older law enforcement officers and firefighters has shown an improvement in performance among older employees." *Id*, at 10. It concludes: "Mandatory retirement for competent law enforcement officers and firefighters is unnecessary and wasteful. The federal government's failure to recognize this problem should not be compounded by allowing states and their political subdivisions to also discriminate against their employees based on age. The states and their political subdivisions should, in accordance with the goals of ADEA, test their public safety officers for fitness rather than make stereotyped assumptions of incapacity due to age." *Id.*, at 24. A general review of authorities supporting the conclusion that chronological age is an unsatisfactory predictor of performance is found in Comment, *The Cost of Growing Old: Business Necessity and The Age Discrimination in Employment Act*, 88 Yale L.J. 565, 576-77 & nn. 50-56 (1979).

articulated in *Usery* v. *Tamiami Trail Tours, Inc.*[18] that in order to prevail on such a defense, the employer "must show that the challenged age qualification is reasonably related to the 'essential operation' of its business and must demonstrate either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impractical to determine fitness on an individualized basis."[19] This test recognizes the statutory command that a BFOQ must be reasonably necessary to the normal operation "of the particular business . . ."[20]

In stark contrast to the case-by-case analysis required by those authorities as well as by this Court's prior decision in *EEOC* v. *Wyoming*,[21] the Fourth Circuit here would impose a single nationwide "federal standard" for all firefighters. Such a standard would do more than deprive workers claiming to be subject to age discrimination of an opportunity to adduce current scientific proof in support of their claim. It would also read out of the BFOQ exception the requirement that the occupational qualification relate to the *particular* business at issue, and the employer's burden of proof with respect to the inability of workers above the age limit to perform effectively and the impossibility or impracticability of determining job fitness on an

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[18] 531 F.2d 222 (5th Cir. 1976).

[19] *See, Mahoney* v. *Trabucco*, 738 F.2d 35 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 513 (1984); *Air Line Pilots Ass'n, Int'l* v. *Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part and rev'd in part, Trans World Airlines, Inc.* v. *Thurston*, 105 S. Ct. 513 (1985); *Arritt* v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel* v. *City of Wauwatosa Fire Dep't. supra; Hoefelman* v. *Conservation Comm'n of Missouri Dep't of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart* v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982).

[20] 29 U.S.C. §623(f)(1).

[21] 460 U.S. 226 (1983).

individualized basis.[22]

The Court of Appeals erred in failing to recognize that jobs with the same broad title such as "firefighter" may in actuality involve markedly differing working conditions, duties and physical and mental demands.[23] Establishing a unitary nationwide "federal standard" for any broad job classification as a matter of law would frustrate Congress' intent to provide each older worker with the right to effectively challenge an age-based compulsory retirement rule in the factual context of his particular job.[24]

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[22] The importance and fairness of basing each decision upon the specific facts governing the individual business is underscored by this case, where the City of Baltimore did not attempt to show that the plaintiffs were not qualified to perform their particular duties. As the district court stated: "The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons." *Johnson* v. *Mayor and City Council of Baltimore*, 515 F. Supp. at 1287, 1296. The court went on to emphasize that, "defendant's own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis. . ." *Id.*, at 1299.

[23] Other courts have understood that differences between similarly-denominated jobs require separate BFOQ reviews. Illustrative of those courts' reluctance to apply a BFOQ to any employee group other than workers covered by the initial employer is *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), which reversed the district court's decision to expand a Federal Aviation Authority's age-60 retirement rule for airline pilots to cover pilots of private corporate aircraft.

[24] This is not to say that the federal retirement rule should be disregarded. Instead, it should be given due consideration as evidence of one employer's judgment regarding the capacities of older firefighters based upon what that employer requires from them, a view to be balanced against evidence of contrasting practices on the part of other employers. As the District Court noted below, of the thirty largest cities in the United States, four have mandatory retirement at age 60 while twenty-two do not require retirement until age 65 or beyond. 515 F. Supp. at 1297. With such diversity among major employers of firefighters, it cannot be said that the conditions which led Congress ten years ago to require retirement at 55 are necessarily duplicated in all cities throughout the nation today.

In sum, a case-by-case, fact-specific determination of the BFOQ defense should be retained to ensure that only justifiable age-based limitations will survive judicial scrutiny, and that impermissible age-based discrimination will be eliminated in accordance with the objectives of ADEA.

III. CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Of Counsel:
STEVEN ZALEZNICK
DAVID CERTNER
PETER SCOTT

Dated: New York, New York
February 28, 1985

Exhibit 1

Letterhead of
U.S. Department of Justice
Office of the Solicitor
Washington, D.C. 20530

February 20, 1985

Steven Zaleznick, Esq.
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

Re: *Johnson, et al. v. Mayor and City Council of Baltimore*, Nos. 84-518 and 84-710

Dear Mr. Zaleznick:

As requested in your letter of February 13, 1985, I hereby consent to the filing of a brief *amicus curiae* on behalf of the American Association of Retired Persons.

Sincerely,

/s/

Rex E. Lee
Solicitor General

Exhibit 2

Letterhead of
Kaplan, Heyman, Greenberg,
Engelman & Belgrad, P.A.
Tenth Floor — Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201

February 20, 1985

Steven Zaleznick, Esquire
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

Re: *Robert W. Johnson, et al. vs. Mayor and City Council of Baltimore, et al.*

Dear Mr. Zaleznick:

Thank you for your letter of February 13, 1985 in which you indicated that AARP requests permission to file a brief amicus curiae on behalf of the Petitioners in the above matter. We have no objection and welcome any assistance.

Kindly feel free to contact me if you would like to discuss the substance of the case.

Very truly yours,

/s/

William H. Engelman

WHE:dmz

Exhibit 3

Letterhead of
City of Baltimore
William Donald Schaefer, Mayor
Department of Law
Benjamin L. Brown, City Solicitor
101 City Hall
Baltimore, Maryland 21202

February 25, 1985

Steven Zaleznick
Attention: Peter Greenwald
Miller, Singer & Raives, P.C.
555 Madison Avenue
New York, New York 10022

Dear Mr. Zaleznick:

The City of Baltimore hereby consent to the filing of a brief amicus curiae by The American Association of Retired Persons on behalf of Petitioners in the case *Robert W. Johnson, et. al. v. Mayor and City Council of Baltimore, et. al.*

Sincerely,

/s/

Ambrose T. Hartman
Deputy City Solicitor

ATH/cd